86-220

No. .....

Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

—o—

JAMES E. WALDRON, JACK HOBBS, and all Retired Federal Officers, Agents, and Employees Similarly Situated in Georgia,

Petitioners,

vs.

MARCUS COLLINS,

Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTION PRESENTED

I

Did the Eleventh Circuit Court of Appeals exercise an incorrect standard of review and err in concluding that it could not consider jurisdictional claims of petitioners which went beyond the district court's asserted ruling and certification?

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No. .....

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vs.

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Respondent.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on May 6, 1986 and the subsequent denial of a timely motion for rehearing and suggestion for rehearing en banc on June 30, 1986.

—o—

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals entered on May 6, 1986 is included as Appendix B to the instant petition. The decision of the United States Court of Appeals for the Eleventh Circuit denying the petition for rehearing and suggestion for rehearing en banc was entered on June 30, 1986, and is included as Appendix C to the instant petition.

———o———

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on May 6, 1986 and a timely suggestion for rehearing en banc was denied on June 30, 1986. This petition for certiorari has been filed within the allowable period from that date; also, jurisdiction is sought because the Eleventh Circuit Court of Appeals did in fact exercise a standard of review of the jurisdictional question below which is in conflict with the decision of another Federal Court of Appeals on the same matter. See 28 U.S.C. § 1254 (1); Rule 17(1)(a) of this court.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The United States Constitution, Section I, Fourteenth Amendment:

Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

2. The Public Salary Tax Act of 1939 provides that:

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

3. 42 U.S.C. § 1983 states:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or to her proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

———o———

STATEMENT OF THE CASE

State granted statutory exemptions from the payment of a State income tax to all persons retired from its employment. All persons retired from the United States Government were excluded from the exemption and required to pay the subject income tax on their retirement benefits. Petitioners asserted that their job descriptions had been identical to those of exempted State employees and that they had contributed to the health and welfare of Georgia equally with exempted State retirees. State offered no evidence of a compelling State interest in giving the exemptions and relied solely on Tax Injunction Statute to refute Federal retiree claims.

Petitioners filed action in the Federal District Court for the Southern District of Georgia, Augusta Division against State of Georgia and its Revenue Commissioner the Honorable Marcus Collins, the respondent herein. Petitioners alleged that the above mentioned practice constituted a discriminatory practice in violation of 4 U.S.C. § 111, an equal protection violation, and a violation of 42 U.S.C. § 1983. The State and its Revenue Commissioner filed a motion to dismiss under the Tax Injunction Act. 28 U.S.C.A. § 1341. District Court certified petitioners' class action involving 100,000+ claimants.

The petitioners alleged 28 grounds in the District Court as to why the State did not provide them with a plain, speedy, efficient, adequate and certain remedy to resolve the dispute, including but not limited to the lack of a class action mechanism; also, petitioners premised that 4 U.S.C. § 111 gave them direct access to the District Court despite the Tax Injunction Statute.

On June 18, 1985 the district entered an order dismissing the State as a party defendant but retaining jurisdiction over the respondent herein, the Honorable Marcus Collins. Said order is included as Appendix "A" to the instant petition.

The District Court stated in part:

> "I am convinced that the plaintiffs *in this case have no remedy which is either speedy or efficient in the courts of Georgia.* This conclusion is no aspersion directed to the noble tribunals of the State. *It is a simple statement that a class action suit in Federal Court will be more efficient than a myriad of different claims,* and that the progress of such—even through appeal—will consume less time than will the process of many claims through the Department of Revenue and the courts of the State."

The District Court certified its June 18, 1985 order for immediate review and commissioner brought interlocutory appeal. Eleventh Circuit Court of Appeals ruled that the absence of a provision for class actions does not render Georgia's procedures for litigating tax matters inadequate within the meaning of the Tax Injunction Statute. Further, Court of Appeals declined to advance beyond the District Court's ruling to consider petitioner's other jurisdictional claims. See Appendix "B" attached.

———o———

REASONS FOR GRANTING WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS EXERCISED AN INCORRECT STANDARD OF REVIEW AND IMPROPERLY CONCLUDED THAT IT COULD NOT CONSIDER JURISDICTIONAL CLAIMS THAT DID NOT GO BEYOND THE DISTRICT COURT'S RULING AND CERTIFICATION.

It was the obligation of the Eleventh Circuit Court of Appeals to explore any promissing avenue to the District Court's jurisdiction, whether or not suggested by the parties. See *Association of Am. Medical Colleges v. Califano*, 569 F. 2d 101 (1977) (Dist. of Co.). In a third Circuit decision, it was held that a Court of Appeals may consider whether jurisdiction was proper on grounds not asserted below. See *Hahn v. United States*, 727 F. 2d 581 (1985; 28 U.S.C.A. § 1653). Also, the Ninth Circuit Court of Appeals has held that appeals court could make independent examination of question of jurisdiction of a District Court. See *Kipperman v. Academy Life Ins. Co.*, 554 F. 2d 377 (1977).

It is respectfully submitted that the Eleventh Circuit decision that it could not examine the jurisdiction question beyond the District Court's ruling and certifcation is in conflict with decisions from three other circuits; therefore, the conclusion appears inescapable that a writ of certiorari should issue in the case subjudice pursuant to Rule 17(1)(a) of this court.

Petitioners submit that Eleventh Circuit Court of Appeals had before it by brief, and otherwise, the following jurisdictional claims which should have been examined and which did, or may, lodge jurisdiction in the District Court despite the Tax Injunction Act:

1. The respondent asserted 4 remedies found in O.C.G.A. §§ 50-13-12, 48-2-59, 48-2-35, and 48-3-1 that provided petitioners with a plain, speedy, and efficient remedy; however, these remedies dealt with deficiency assessments and could not be used by any petitioner until the Revenue Commissioner made an assessment against a particular income tax return. See *Ingalls Iron Works Company v. Blackmon,* 133 Ga. App. 164, 210 S. E. 2d 378(1) (1974).

2. That the petitioners have all paid their income tax to the State up and through the 1985 taxable period; therefore, not a single assessment has or will be forthcoming.

3. That under Georgia law the mere filing of an income tax return is not an assessment. See *Ingalls Iron Works Company v. Blackmon, supra.*

4. That it is axiomatic that not a single petitioner could force the respondent to make the necessary assessment required to activate any one of the four State remedies. Assuming, but not deciding, that there was error in any of petitioners' return.

5. In income tax matters in Georgia, injunctive relief is not available to petitioners either jointly or individually. See *O.C.G.A. § 48-7-84.*

6. *O.C.G.A. §§ 48-2-35(A) and 48-2-35(b)(1),* the Georgia refund section expressly states that said sections are only applicable after an *assessment and collection* occurs; therefore, since not a single petitioner has been hit with a deficiency assessment, this section is clearly unavailable.

7. Assuming, but not deciding, that any petitioner were to be hit with the subject assessment for one or more

of the taxable periods in question and chose to litigate all the issues being presented in petitioner's complaint before this court under one of the four involved Georgia methods, the results, or outcome, would not be binding on any other petitioner since the doctrine of "*binding precedent*" has been abolished in Georgia. See *Norris v. Atlanta & West Point R. Co.*, 254 Ga. 864, 333 S.E. 2nd 835, 838 (1985).

8. Noteworthy, is the fact that if any petitioner decides not to pay his income tax for the '86 taxable period for the reasons asserted in their complaint below all in an effort to activate one of the four Georgia methods, he will occupy the role of *tax protestor* and could be prosecuted by the State; also, this *protestor* role is no guarantee that the Commissioner will make the necessary assessment which is a precedent to activating one of the four Georgia methods.

9. That none of the four Georgia methods provide in futuro relief or relief for past discriminatory practice.

10. That it was argued below by petitioners that the case of *Garrett v. Bamford*, 538 F. 2d 364 (1974) stood for the following under the facts and circumstances of the case subjudice.

a) That when in futuro relief is not available under the available State remedies, the Tax Injunction Act is not a bar to Federal relief; likewise when no remedy is available for past discriminatory practices;

b) That a multiplicity of suits jamming up the State courts should be avoided by granting Federal relief;

c) That a State should not be permitted to stand upon burdensome piecemeal review procedures as an ef-

fective defense to valid constitutional and statutory claims Noticed is the fact that this would be the "big picture" if an assessment were made against a single petitioner;

d) That duplicative attorney fee costs, etc. should be avoided by granting Federal relief when the available State remedies require 100,000+ individual review actions assuming in this instance that 100,000+ assessments were made against all the petitioners by the State;

e) That since, the abolishing of the "Doctrine of Binding Precedent" in Georgia, no one relief, if an assessment were made, would extend beyond the individual taxpayer; therefore, Federal relief should be granted; and

f) Inefficiency of separate actions at law involving the same issue and a common defendant, might deter large groups of individuals from seeking judicial relief. Noticed here is that no one petitioner has a remedy in Georgia unless he first becomes a protestor by not paying his tax and succeeds in prompting a deficiency assessment from the Commissioner.

11. That the four Georgia methods deal with deficiency assessments and are not designed to handle 100,000+ 4 U.S.C. § 111 discrimination claims, 100,000+ equal protection claims, and 100,000+ 42 U.S.C.A. § 1983 Civil rights claims.

12. That petitioners' 100,000+ claims depend in part on discovery; however, in Georgia the Revenue Commissioner is not a court of record and no discovery can be had against him under the Georgia Civil Practice Act.

13. That 100,000+ petitioners are alleging systematic, intentional, arbitrary, invidious, and purposeful discrimi-

nation by the State against them as a group; therefore, the four Georgia remedies are not, plain, speedy, and efficient even if 100,000+ assessments were made against each petitioner to activate any remedy to the advantage of all assessed petitioners.

14. That if any of the 100,000+ petitioners declined to pay his '86 tax in an effort to activate one of the four involved Georgia methods, he would become a tax protestor with every reason to believe that he would be prosecuted by the State.

15. That a 4 U.S.C. § 111 claim or a 42 U.S.C.A. § 1983 claim have never been successful in Georgia under one of the four Georgia methods.

16. That under the supremacy clause of the United States Constitution, 4 U.S.C. § 111 gives petitioners direct access to the District Court despite the Tax Injunction Statute.

———o———

CONCLUSION

For all of the above and foregoing reasons, petitioners pray that this court grant a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

James F. Findlay
Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION
CV185-039

JAMES E. WALDRON, JACK HOBBS,
and All Retired Military, Federal Officers, Agents,
and Employees Similarly Situated,

Plaintiffs

vs.

MARCUS COLLINS, Individually and in his
Capacity as Georgia State Revenue Commissioner,
and The Agency, Georgia Department of Revenue,

Defendants

ORDER

(Filed June 18, 1985)

Before the court is the defendants' motion to dismiss plaintiffs' recast and amended complaint. The Court has already dismissed the State of Georgia as a party defendant. The eleventh amendment to the United States Constitution still has some vitality. "The agency, the Department of Revenue" is not a separate entity but, in truth, an element of the State of Georgia. With respect to the State of Georgia and its agency or element, the Department of Revenue, the complaint is DISMISSED. The state cannot be a "person" within the meaning of 42 U.S.C. § 1983.

The other defense raised, the Tax Injunction Act (28 U.S.C. § 1341)[1] is one subject to little interpretation. The Tax Injunction Act presents a broad shield to a plaintiff's attack in federal court. Its language is mandatory and terse. There is nothing about its language which is mild or permissive.[2] It is only with great difficulty that a plaintiff may clear such a hurdle.

I am convinced[3] that the plaintiffs in this case have no remedy which is either speedy or efficient in the courts of Georgia. This conclusion is no aspersion directed to the noble tribunals of the state. It is a simple statement that a class action suit in federal court will be more efficient than a myriad of different claims, and that the progress of such —even through appeal—will consume less time than will the process of many claims through the Department of Revenue and the courts of the state.

Accordingly, the motion to dismiss is GRANTED with respect to "The Agency, Georgia Department of Revenue", and the motion is DENIED with respect to the Honorable Marcus Collins, State Revenue Commissioner.

Pursuant to the provisions of 28 U.S.C. § 1292(b) and my opinion that this civil case presents a controlling ques-

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[1]"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[2]It could be said in the words of one sage of this district that the language of this brief statute is as "strong as a garlic milkshake."

[3]Although not by the plaintiffs' rambling brief which, *inter alia*, speaks of "State rights, perverted from their true significance, that arrayed themselves against the nation and threatened its existence."

tion of law as to which there is a very substantial ground for difference of opinion, I certify that an immediate appeal from this order by either of the parties will materially advance the ultimate termination of this litigation. In the event that the Court of Appeals, in its discretion, permits an appeal from this order, all further proceedings in this court shall be stayed.

ORDER ENTERED at Augusta, Georgia, this 18th day of June, 1985.

Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

James E. WALDRON, Jack Hobbs, and
all Retired Military, Federal Officers,
Agents, and Employees Similarly Situated,

Plaintiffs-Appellees,

v.

Marcus COLLINS, Individually, and in his
capacity as Georgia State Revenue Commissioner,

Defendant-Appellant.

No. 85-8556.

United States Court of Appeals,
Eleventh Circuit.

May 6, 1986.

Federal retirees brought class action against State Revenue Commissioner, seeking declaratory and injunctive relief, alleging state policy of taxing federal retirement benefits while exempting state retirees' benefits violated equal protection clause and Public Salary Tax Act of 1939, and later added civil rights claim, seeking income tax refunds. Commissioner moved to dismiss. The United States District Court for the Southern District of Georgia, Dudley H. Bowen, Jr., District Judge, denied the motion, but certified the order for immediate review and Commissioner appealed. The Court of Appeals, Hatchett, J., held that absence of provision for class actions did not render state's procedure for litigating state income tax questions inadequate and thus, federal jurisdiction was precluded under Tax Injunction Act.

Reversed.

Appeal from the United States District Court for the Southern District of Georgia.

Before KRAVITCH and HATCHETT, Circuit Judges, and DUMBAULD*, Senior District Judge.

HATCHETT, Circuit Judge:

In this case, we are called upon to decide whether Georgia's procedures for litigating state tax assessments are inadequate because they do not provide for class actions. The district court held Georgia's procedures inadequate; we reverse.

A group of federal retirees residing in Georgia (taxpayers), brought this class action in federal district court alleging that the state of Georgia's tax policy discriminated against them because it imposed taxes on their retirement benefits, but exempted state of Georgia retirees' benefits from taxation. The taxpayers contended that Georgia's policy violated the equal protection clause and the Public Salary Tax Act of 1939, 4 U.S.C. § 111.[1]

---

* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

1. The Public Salary Tax of 1939 provides that:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

The taxpayers sought declaratory and injunctive relief against the state of Georgia and Marcus Collins, Georgia State Revenue Commissioner. Georgia and Collins moved to dismiss the action citing the Tax Injunction Act, 28 U.S.C. § 1341 and the eleventh amendment. The Tax Injunction Act prevents taxpayers from litigating in federal courts if state remedies for contesting state tax assessments are "plain, speedy, and efficient."

After a hearing, the district court denied Collins's motion to dismiss, granted the state of Georgia's motion to dismiss, but granted the taxpayers leave to amend their complaint. The taxpayers' amended complaint added the Georgia Department of Revenue as a defendant and added a claim under 42 U.S.C. § 1983 seeking $300 million in state income tax refunds and other damages. Collins and the Georgia Department of Revenue moved to dismiss the taxpayers' amended complaint for lack of subject matter jurisdiction, again citing the Tax Injunction Act and the eleventh amendment. The district court granted the Georgia Department of Revenue's motion to dismiss, but denied Collins's motion to dismiss. The court held that it was not deprived of jurisdiction because Georgia's remedies for litigating state income tax questions were not "plain, speedy, and efficient" within the meaning of the Tax Injunction Act. The district court ruled that the defect in Georgia's scheme was its failure to provide for class actions. The district court certified its order to this court for immediate review. We granted Collins permission to appeal.

On appeal, Collins contends that Georgia's procedures for litigating state income tax questions are "plain, speedy, and efficient" within the meaning of the Tax Injunction

Act, and that the absence of a provision for class actions does not render the state's procedures inadequate. The taxpayers contend, among other things, that the Georgia scheme is inadequate and that the Public Salary Tax Act of 1939 confers jurisdiction upon the district court notwithstanding the Tax Injunction Act's bar.[2]

The Tax Injunction Act, 28 U.S.C. § 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.[3]

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2. The taxpayers also contend that the district court prematurely dismissed the state of Georgia and the Georgia Department of Revenue. That issue is not properly before us; the district court certified its order, and we allowed this appeal to resolve one question: whether Georgia's procedures for litigating state income tax questions are plain, speedy, and efficient within the meaning of the Tax Injunction Act?

3. Congress had a two-fold purpose in passing the Tax Injunction Act. First, Congress sought to foreclose the federal forum to foreign corporations that invoked federal diversity jurisdiction to delay payment of state taxes. Congress felt it unjust that corporations could bring such actions in federal court because state citizens could not obtain a federal forum based on diversity jurisdiction. By passing the Tax Injunction Act, therefore, Congress sought to provide for equal treatment between corporations and citizens regarding payment of state taxes. Second, Congress sought to end the disruption of local financing resulting from injunction actions in the federal courts. By bringing actions in the federal courts, taxpayers often frustrated the collection efforts of local officials, forcing them to compromise suits and lose tax revenues. *See Williams v. City of Dothan, Alabama*, 745 F.2d 1406, 1412 n. 7 (11th Cir.1984); *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975).

Thus, federal jurisdiction may not be exercised if two elements are present: (1) the relief requested by the plaintiff will "enjoin, suspend, or restrain" a state tax assessment; and (2) the state affords the plaintiff a "plain, speedy, and efficient remedy." *Williams v. City of Dothan, Alabama,* 745 F.2d 1406, 1411 (11th Cir. 1984). The first element is present in this case because the taxpayers pray for damages and injunctive relief. *See Moss v. State of Georgia,* 655 F.2d 668 (5th Cir.1981); *A Bonding Company v. Sunnuck,* 629 F.2d 1127, 1133 (5th Cir.1980).

The district court's rationale for holding that Georgia's procedures were not plain, speedy, and efficient within the meaning of the Tax Injunction Act, was that:

> [A] class action suit in federal court will be more efficient than a myriad of different claims and that the progress of such—even through appeal—will consume less time than will the process of many claims through the Department of Revenue and the courts of the state.

The district court's evaluation of the relative convenience of the state and federal forums is correct; however, the applicability of the Tax Injunction Act does not turn on which forum is best able to entertain the action. Rather, the Act bars the exercise of federal jurisdiction whenever the state provides adequate procedures to contest state tax matters.

In *Bland v. McHann,* 463 F.2d 21 (5th Cir.1972), the plaintiffs contended that Mississippi's procedure for litigating tax liability questions was inadequate because it did not provide for class action litigation. Among other things, the former Fifth Circuit stated:

> Taxpayers' complaints that the Mississippi remedy is inadequate appear in reality to be an argument that

> a *better* remedy would be available in the federal courts. Neither the judicial decisions nor § 1341 requires that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the federal courts. Section 1341 merely requires that the state remedy be 'plain, speedy and efficient.'

McHann at 29.

Georgia taxpayers may utilize four statutory means to contest their tax liability. They may: (1) appeal the assessment directly to the superior court pursuant to O.C.G.A. § 48-2-59; (2) pay the tax and bring an action for a refund pursuant to O.C.G.A. § 48-2-35; (3) file an affidavit of illegality to the levy of execution and have the case heard in superior court pursuant to O.C.G.A. § 48-3-1; and (4) appeal under Georgia's Administrative Procedure Act, O.C.G.A. § 50-13-12.

We conclude that the absence of a provision for class actions does not render Georgia's procedures for litigating tax matters inadequate within the meaning of the Tax Injunction Act.

Other circuits have come to the same conclusion. *See Miller v. Bauer*, 517 F.2d 27 (7th Cir.1975); *Mandel v. Hutchinson*, 494 F.2d 364 (9th Cir.1974). We are not persuaded to conflict with our sister courts. The taxpayers, citing *Garrett v. Bamford*, 538 F.2d 63 (3d Cir.1976), contend that such a conflict already exists. Reviewing *Garrett*, however, we conclude that the Third Circuit's decision does not conflict with the other circuits.

In *Garrett*, residents of a non-white area of Berks County, Pennsylvania, brought a class action in district

court alleging that the county's method of tax assessment was racially discriminatory in violation of 42 U.S.C. §§ 1981, 1983, and the fourteenth amendment. The district court dismissed the claim. The Third Circuit reversed holding that the statutory remedy was not plain, speedy, and efficient in cases where "plaintiffs allege systematic and intentional class based racial discrimination in tax assessments." *Garrett* at 72. *Garrett* does not stand for the proposition that a state procedure which does not provide for class action litigation is not plain, speedy, and efficient within the meaning of the Tax Injunction Act.

In a subsequent decision, *Robinson Protective, etc. v. City of Philadelphia,* 581 F.2d 371 (3d Cir.1978), the Third Circuit explained the peculiar concerns underlying the court's decision in *Garrett* which are not commonly present in cases involving challenges to tax assessments. *See Robinson* at 377, 378. The *Robinson* court accorded significance to the fact that *Garrett* involved an equal protection challenge based on a claim of racial discrimination.

> Where state tax codes utilize classifications which are constitutionally suspect, triggering strict scrutiny, we may require greater certainty of the adequacy of the state remedy before closing the federal equity courthouse door. However, where state taxpayers' constitutional challenge necessitates only minimum scrutiny of the rationality of economic classifications, a somewhat less strict certainty as to the adequacy of state remedies may be sufficient.

Robinson at 378 n. 15.

Even if *Garrett* stood for the proposition that the taxpayers advance, we would not be inclined to follow it.

The taxpayers allege several other inadequacies in the Georgia procedure for litigating tax matters in addition to

the lack of a class action litigation remedy. The district court held the Georgia procedure inadequate because it did not provide for class action litigation; consequently, we need not consider claims which go beyond the district court's ruling and certification.

We hold that the absence of a provision for class actions does not render Georgia's procedure for litigating state income tax questions inadequate. The judgment of the district court is reversed.[4]

REVERSED.

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4. Principles of comity also caution against our providing the taxpayers a federal forum in this case. *See Winicki v. Mallard*, 783 F.2d 1567 (11th Cir.1986), where this court held that the principle of comity barred a federal action challenging the constitutionality of Florida's homestead tax exemption statute, even though the statute was subsequently repealed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8556

JAMES E. WALDRON, JACK HOBBS, and
all Retired Military Federal Officers,
Agents, and Employees similarly situated,

Plaintiffs-Appellees,

versus

MARCUS COLLINS, Individually, and in his
capacity as Georgia State Revenue Commissioner,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion May 6, 11 Cir., 1986, — F.2d —).
(June 30, 1986)

Before KRAVITCH and HATCHETT, Circuit Judges, and DUMBAULD*, Senior District Judge.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Joseph W. Hatchett
United States Circuit Judge

REHG-6
(Rev. 6/82)

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

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No. 86-220

In The
Supreme Court of the United States
October Term, 1986

JAMES E. WALDRON, JACK HOBBS, and all Retired Federal Officers, Agents, and Employees Similarly Situated in Georgia,

Petitioners,

vs.

MARCUS COLLINS, Individually and In His Capacity as Georgia State Revenue Commissioner,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari solely to determine if the Eleventh Circuit Court of Appeals improperly failed to address certain arguments advanced by petitioners during the appeal of the district court's interlocutory order pursuant to 28 U.S.C. § 1292(b), where petitioners can obtain a ruling on the merits of any such arguments simply by appealing the district court's final order to the court of appeals.

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No. 86-220

In The

Supreme Court of the United States

October Term, 1986

JAMES E. WALDRON, JACK HOBBS, and all Retired Federal Officers, Agents, and Employees Similarly Situated in Georgia,

Petitioners,

vs.

MARCUS COLLINS, Individually and In His Capacity as Georgia State Revenue Commissioner,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the Revenue Commissioner of the State of Georgia, respectfully opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The petitioners wish this Court to grant certiorari solely to determine if the Eleventh Circuit improperly failed to address certain arguments advanced by petitioners during the appeal of the district court's interlocutory order pursuant to 28 U.S.C. § 1292(b). Because the petitioners can obtain a ruling on the merits of any such arguments simply by appealing the district court's final order in this case to the court of appeals, the procedural question posed by petitioners is merely of academic interest and of insufficient importance to warrant this Court's review.

STATUTORY PROVISIONS

(1) 28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(2) 28 U.S.C. § 1341 (Tax Injunction Act):

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

———o———

STATEMENT OF THE CASE

Petitioners, a group of federal retirees residing in Georgia, brought the present class action in federal district court for the Southern District of Georgia, contending that the State of Georgia could not (for various constitutional and statutory reasons, including 4 U.S.C. § 111

and equal protection) subject their retirement income to state income taxation. (Petitioners' Appendix, page 5, hereinafter cited as "Pet. App.") Petitioners (hereinafter referred to as "the taxpayers") requested various types of declaratory and injunctive relief against Marcus Collins, Georgia State Revenue Commissioner, and the State of Georgia. (Pet. App. 6.)

Commissioner Collins and the State of Georgia moved to dismiss the taxpayers' complaint for lack of subject-matter jurisdiction, relying on the Tax Injunction Act (28 U.S.C. § 1341) and the Eleventh Amendment. After a hearing on the motion to dismiss filed by Commissioner Collins and the State of Georgia, the district court dismissed the State as a defendant. The district court denied Commissioner Collins' motion to dismiss, however, and granted the taxpayers leave to amend their complaint. (Pet. App. 6.)

In accordance with the district court's instructions, the taxpayers filed an amended complaint, which added the Georgia Department of Revenue as a defendant and included a claim under 42 U.S.C. § 1983 seeking $300,000,000 in state income tax refunds and $300,000,000 in other damages. Commissioner Collins and the Georgia Department of Revenue moved to dismiss the taxpayers' amended complaint for lack of subject-matter jurisdiction, again asserting the Tax Injunction Act and the Eleventh Amendment. (Pet. App. 6.)

The district court granted the Georgia Department of Revenue's motion to dismiss, but denied Commissioner Collins' motion to dismiss. The district court held that Georgia's statutory procedures for litigating state income

tax questions were not "plain, speedy and efficient" within the meaning of the Tax Injunction Act, since none of Georgia's remedies permitted class action litigation. At the same time, the district court certified its order to the Eleventh Circuit for immediate review pursuant to 28 U.S.C. § 1292(b). (Pet. App. 6.) The Eleventh Circuit granted Commissioner Collins' petition to appeal the district court's order, and on May 6, 1986, the court of appeals reversed. (Pet. App. 4 through 11.)

On August 18, 1986, the district court entered its order adopting the judgment of the Eleventh Circuit, and on August 21, 1986, in accordance with such order, the district court entered judgment in favor of Commissioner Collins. (Respondent's Appendix, pages 1 and 2).

—o—

SUMMARY OF ARGUMENT

The taxpayers ask that the Court grant certiorari solely to determine if the Eleventh Circuit improperly failed to address certain arguments advanced by the taxpayers during the court of appeals' review of the district court's interlocutory order in this case. The taxpayers can easily, however, appeal the district court's final order in this case, obtain a ruling from the Eleventh Circuit itself regarding the scope of its earlier decision, and get a decision from the court of appeals on the merits of any remaining arguments. The procedural question posed by the taxpayers is merely of academic interest to the case and of insufficient importance to warrant this Court's review.

—o—

ARGUMENT

Because none of Georgia's statutory procedures for litigating state income tax questions permits class action litigation, the district court held that Georgia's remedies are not "plain, speedy and efficient" within the meaning of the Tax Injunction Act and denied Commissioner Collins' motion to dismiss the taxpayers' complaint for lack of subject-matter jurisdiction. The taxpayers apparently do not contend that the Eleventh Circuit erred in deciding that the absence of a class action mechanism did not make Georgia's tax procedures inadequate for purposes of depriving the federal court of jurisdiction. However, the taxpayers argue that the Eleventh Circuit's review of the district court's order was improperly limited to the stated reason for the district court's ruling—i.e., the unavailability of a class action in state court for cases of this nature—and that the Eleventh Circuit should have considered all arguments in support of the district court's refusal to dismiss the complaint against Commissioner Collins.

Despite the taxpayers' contention that the Eleventh Circuit applied an incorrect standard of review in reaching its decision, it is apparent that the taxpayers' complaint actually concerns what the taxpayers believe to be the limited scope of the court of appeals' review. Those circuits directly considering the question have held that an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is from the order of the district court rather than from the opinion underlying the order, that the appellee can assert in the court of appeals any ground in support of the district court's order (whether or not that ground was

relied upon or even considered by the district court in its opinion), and that the court of appeals, if it considers any of the appellee's arguments to have merit, should affirm the district court's order rather than reverse. *See Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n.16 (5th Cir. 1985); *Angle v. United States*, 709 F.2d 570, 573 (9th Cir. 1983); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 502 (3rd Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). *Cf. Federal Deposit Insurance Corp. v. Dye*, 642 F.2d 833, 837 (5th Cir. 1981) (separate interlocutory orders other than the one certified for review may not be considered). *See generally* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3929 at 143-45 (1977); Note, *Interlocutory Appeals Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-29 (1975). Commissioner Collins agrees that this is the preferred way to handle interlocutory appeals pursuant to 28 U.S.C. § 1292(b), and took this position before the Eleventh Circuit.

Commissioner Collins does not concede that the Eleventh Circuit in fact applied 28 U.S.C. § 1292(b) in a manner narrower than that discussed above. Despite this possible point of contention, however, this case presents no issues which warrant resolution by this Court. The taxpayers believe the court of appeals erred in not addressing, at the time of the interlocutory appeal, all of their arguments in support of the district court's order. The district court's final order in this case is now subject to appeal to the Eleventh Circuit pursuant to 28 U.S.C. § 1291. The taxpayers can easily, without the intervention

of this Court, appeal the district court's final order and obtain a ruling from the Eleventh Circuit itself regarding the scope of its earlier decision. If the Eleventh Circuit confirms that its previous decision was meant to dispose of all of the taxpayers' arguments, it will be evident that the error upon which the taxpayers base their petition for certiorari did not occur.

Certiorari would be unnecessary to this case even if the Eleventh Circuit clearly meant to consider only that argument adopted by the district court as the basis for its interlocutory order. Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are special and important reasons for it. U.S. Sup. Ct. Rule 17; *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73 (1955). The refusal of the Eleventh Circuit to consider additional arguments, based on its interpretation of the scope of review in interlocutory appeals pursuant to 28 U.S.C. § 1292(b), would merely reserve such arguments for a later stage in the proceedings. This Court does not need to issue certiorari in order to secure for the taxpayers a full review of all their arguments; such a review is readily available in the Eleventh Circuit pursuant to an appeal of the district court's final order, with the right to petition this Court for certiorari following any later ruling by the court of appeals.

———o———

CONCLUSION

The taxpayers' petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION NO. 185-39

JAMES E. WALDRON, et al.,

Plaintiffs

vs.

MARCUS COLLINS, Individually and in His Capacity as Georgia State Revenue Commissioner,

O R D E R

(Filed Aug. 18, 1986)

The Judgment of this Court in the above entitled having been reversed,

IT IS HEREBY ORDERED that the judgment of the Eleventh Circuit is made the judgment of this Court.

This 18th day of August, 1986.

/s/ Dudley H. Bowen, Jr.
Judge, United States District Court

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

JUDGMENT IN A CIVIL CASE

CASE NUMBER CV185-0039

JAMES E. WALDRON, et al.

v.

MARCUS COLLINS, Individually and in His Capacity as Georgia State Revenue Commissioner

( ) *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) *Decision by Court.* This action came on for decision before the Court. The issues have been appealed and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the August 18, 1986 order of this Court adopting the Judgment of the United States Court of Appeals for the Eleventh Circuit, JUDGMENT is hereby entered in favor of the defendant and against plaintiffs. Costs are hereby assessed against plaintiffs, to be taxed by the Clerk of Court.

APPROVED:

/s/ Dudley H. Bowen, Jr., Judge

August 21, 1986
Date

Henry R. Crumley, Jr.
Clerk

/s/ Linda J. Flanders
(By) Deputy Clerk